IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 339

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NEWS SYNDICATE COMPANY, INC., AND NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,

Respondents.

BRIEF OF RESPONDENT NEWS SYNDICATE CO. INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The primary concern of the respondent company, News Syndicate Co. Inc. (publisher of the newspaper "Daily News" and hereinafter referred to as the "News"), on the petition for enforcement of the Board's order in the Court of Appeals, was with the "reimbursement of dues" remedy imposed by the Board jointly and severally upon the News and the Mailers' Union. Under the facts and circumstances of the case, the News argued that the imposition of that remedy, which then involved a potential liability in excess of a quarter of a million dollars, was inappropriate, illogical and unjust. The major thrust of the brief of the News to the Court of Appeals was directed toward that contention.

The Court of Appeals did not reach the question of the appropriateness of the remedy, since it concluded that there was no violation of the law by reason of the contract provisions or by reason of the hiring practices.[1] The Board's principal argument—that the failure to specify which General Laws of the International Typographical Union (hereinafter the "ITU") were incorporated by reference into the contract had the effect of encouraging Union membership in that employees would tend to view the contract as including rules requiring Union membership as a condition of employment—was rejected. The Court accepted the contention of respondents that the ITU General Laws "in conflict with * * * federal law" were not incorporated into the contract and that no employees were coerced into joining the Union on the understanding that Union membership was a condition of employment.

The News had never read the contract as incorporating any unlawful General Laws and doubts that any employee or prospective employee felt constrained to join the Union because he read the contract and the General Laws and concluded that membership in the Union was a condition of employment. At least there was no evidence in the record that the incorporation by reference of the General Laws into the contract had any such effect upon any individual employee.

The record in the case shows that all who worked at the trade, including the charging parties and other casual

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[1] The Court of Appeals did sustain the Board's finding of discrimination against the charging party in the News case by reason of the fact that he was not hired on a particular night, but it sustained that finding as a violation of Section 8(a)(4) of the Act, a violation that was not charged or found by the Board.

workers, were anxious to join the Union and did so as soon as they were eligible under the Union's membership rules (R. 101, 104, 199).[2] Rather than Union membership being a condition of employment, having a regular situation in the industry was a condition of membership in the Union (R. 181, 187-8, 193-4).

The contracts that are the subject of the Board's order do not even contain the usual union shop clause, permitted by Section 8(a)(3) of the Act, requiring membership in the union 30 days after employment. Many non-union men work in the trade as "extras" or "casuals". Thus, union membership was and is not a condition of employment. As these non-union men advanced to more regular positions, they became eligible for Union membership and all who became eligible for membership joined the Union.

Randall, the charging party in the News case, wanted to join the Union (R. 43, 78), but he was not eligible because he was only a weekend worker who had a full time job outside the industry (App. 39). Randall filed his charge against the News following the promotion of 31 non-union extras to regular substitute status. These men were promoted and hired in preference to Randall because they had met an objective, non-discriminatory standard. All of these men who were promoted were then eligible for Union membership and all joined the Union. Membership in the Union was not a factor in their promotion and retention of their position with the News did not depend upon their joining the Union.

The News and other publishers signatory to the contract do not wish to retain the clause incorporating the

[2] "R." refers to the Joint Appendix filed in the Court of Appeals and "App." refers to the Appendix to the Board's petition.

ITU General Laws and would prefer to be free of the requirement that foremen must be members of the Union. However, the publishers have not succeeded in eliminating these clauses in collective bargaining. Such clauses are historic in the industry and they have been in existence since long prior to the passage of the Taft-Hartley Act in 1947. The publishers had never been in the position to contend, with authoritative support, that such clauses were illegal. The exception in the incorporation by reference clause, relating to laws "in conflict with federal law" was added shortly after the passage of the Taft-Hartley Act for the purpose of avoiding any violation of that Act. Until the ruling made by the Trial Examiner in this case, there had been no ruling by the Board or by any court that the provisions under attack by the Board in this case resulted in a violation of law. The publishers would eliminate these clauses, not because they are convinced that they are illegal under the present law, but because they are restrictive (R. 734-5).

When the Trial Examiner issued his Intermediate Report recommending the posting of notices of intent not to discriminate and the elimination of certain contract provisions, the News was quite willing to accept his recommendations and it filed no exceptions to the Intermediate Report (R. 732). In fact, the News posted a notice[3] in its mail room containing the substance of the notice recommended by the Trial Examiner. The Trial Examiner had not, how-

[3] A copy of that notice is annexed as Appendix A hereto. It was posted by the News on its own initiative, rather than in compliance with the recommended order, because the question of the enforcement of the order was being litigated.

ever, recommended the imposition of the *Brown-Olds*, "reimbursement of dues" remedy. When the Board imposed that remedy against the News, the News was forced to join with the Union in opposing enforcement of the Board's order.

The Court of Appeals has now denied enforcement of the Board's order, rejecting the Board's principal contention as to the alleged violations of the Act. The News does not question the correctness of the opinion of the Court of Appeals on the issues decided. From its selfish point of view, the News would prefer to let the case stand as decided by the Court of Appeals. It has much to lose and nothing to gain by any further review and, therefore, opposes the granting of the petition for a writ of certiorari.

However, it is expected that the respondent Union, a subordinate local of the ITU, will not oppose the Board's petition in this case because its sister locals in Worcester and Haverhill, Massachusetts, have petitioned for a writ of certiorari to the Court of Appeals for the First Circuit for a review of the principal question that the Board presents herein, which question was decided the other way by the First Circuit. Both the Board and the ITU are interested in sustaining their respective successful positions and, therefore, each is anxious for a review by this Court in both cases. The News has no such axe to grind.

However, the News wishes to protect itself from the "meat-axe"[4] remedy imposed upon it by the Board. There-

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[4] This term was used by a Trial Examiner to describe the *Brown-Olds* remedy. He said it was a "meat-axe remedy applied in a meat-axe fashion". *Ingalls Steel Constr. Co.*, Case No. 15 CA 1174, 15 CB 249, 15 CB 251, 44 LRR 408 (August 21, 1959).

fore, in the event that this Court grants the Board's petition in this case, the News urges that the question of the appropriateness of the "reimbursement of dues" remedy proposed by the Board in its order also be considered by this Court.

It is understood that the appropriateness of this "reimbursement of dues" remedy is before the Court in *Local 60, Carpenters* v. *NLRB*, No. 68, October Term, 1960, and in *NLRB* v. *Local 357, Teamsters*, No. 85, cert. granted June 27, 1960, 363 U. S. 837, but in those cases the inappropriateness of the remedy does not appear as clearly or to the same degree as in this case. This Court could sustain the Board's remedy in those cases, whereas, it is submitted, under the facts and circumstances presented in this case, the remedy imposed against the News could not be sustained.

The following circumstances relating to the imposition of the *Brown-Olds* penalty against the News appear from the record in this case:

1. The Board's order requires the News to "reimburse" dues it never received or even checked off to the Union.

2. Despite the clear mandate in Section 5(a) of the Administrative Procedure Act, 5 U. S. C. §1004, that an administrative agency shall notify all parties of "the matters of fact and law asserted" against them, there was never the slightest intimation in the pleadings, at the hearing, or in any of the briefs that the News was to be punished under the *Brown-Olds* theory.

3. The General Counsel conceded the good faith of the parties in the execution of the contract under attack

and never hinted or suggested at any stage of the proceedings that the case was an appropriate one for the harsh *Brown-Olds* remedy to be applied against the employer, until the oral argument before the Board when a Board member asked about the imposition of this remedy.

4. The News would be required by the Board's order to reimburse dues to about 230 mail room employees paid over a three-year period when it appears that most of these employees were members of the Union of long standing, many pre-dating passage of the Taft-Hartley Act, and where there is no evidence that anyone was coerced into joining the Union.

5. The members of the Union, who enjoyed the benefits of the contract and of Union membership during the period, would receive this windfall in the form of reimbursement of their dues paid to the Union.

6. The penalty proposed by the Board jointly and severally upon the News and the Union imposes a harsher burden upon the News than upon the Union. The News is required to "reimburse" one-half the dues which it never received, while the Union will "reimburse" one-half of the dues that it actually collected. Thus the Union will be able to retain the other half of the dues that it collected. In addition, the Union, which does not exist apart from all its members, can assess its members the amount of the reimbursement it must make to them, while the News will have no recourse but to pay its share of the penalty from its own funds.

In *Local 60, Carpenters* v. *NLRB*, *supra*, where the Seventh Circuit found the remedy to be appropriate in the circumstances of that case, the remedy was not imposed against the employer. In *NLRB* v. *Local 357, Teamsters*,

supra, the reimbursement of dues required by the Board's order related only to casual employees and not to all employees in the unit who are members of the Union as in this case. The News is concerned that the *Brown-Olds* remedy might be approved by this Court in those cases. Then, if the Board's petition is granted here without bringing up for review the question of the appropriateness of the remedy sought by the Board, and this Court reverses the Circuit Court on the question of the legality of the contract and the hiring practices, the Court of Appeals on remand might sustain the Board's proposed remedy.

CONCLUSION

Therefore, the News requests that the petition for a writ of certiorari be denied, or if it is granted, that the question of the appropriateness of the "reimbursement of dues" remedy also be reviewed by this Court.

Respectfully submitted,

STUART N. UPDIKE,
Attorney for Respondent,
News Syndicate Co. Inc.

ANDREW L. HUGHES,
of Counsel.

APPENDIX A

NOTICE TO ALL FOREMEN, EMPLOYEES AND APPLICANTS FOR EMPLOYMENT IN THE MAIL ROOM UNIT

Employment in the NEWS mail room unit is not conditioned upon union membership. No preference in employment is accorded to union members by reason of their membership in any union. Membership or non-membership in any union is not a factor in the control or maintenance of employment seniority or priority, apprenticeship training or competency testing. Employment in the mail room unit of the NEWS is based upon competency. Extras are hired on the basis of their position on lists posted in the mail room.

Foremen, who do the hiring, are not obligated to comply with any provision of the General Laws, Constitution, By-laws or any other laws of the INTERNATIONAL TYPOGRAPHICAL UNION or the NEW YORK MAILERS' UNION No. 6 which may call for closed shop or union preferential hiring and are hereby instructed that membership or non-membership in any union shall not be a factor in hiring, discharge, or tenure of employment.

So far as the Management of the News is concerned, all employees in the mail room are free to become, remain or refrain from becoming or remaining members of NEW YORK MAILERS' UNION No. 6, or any other labor organization, until such time as they are notified that this right has been affected by an agreement in conformity with Section 8(a)(3) of the National Labor Relations Act, as amended, providing for a union shop, and are free to exercise their rights guaranteed by Section 7 of the Act.

Continued membership in any labor organization by mail room employees is a matter of individual choice by

Appendix A

each employee. Employees in the mail room who remain members of NEW YORK MAILERS' UNION, NO. 6 are not bound to follow any provisions of the General Laws, Constitution, By-laws or any other laws of the International or local, which may call for closed shop or union preferential hiring.

The NEWS reserves the right to reject any applicant for employment referred by the union.

NEWS SYNDICATE CO. INC.
(Employer)

By /s/ P. B. STEPHENS, General Manager
(Name of Officer) (Title)

The above notice should remain posted for at least sixty (60) days and should not be altered, defaced or covered by any other material.